



IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983
No. 83-1685

TIMOTHY CORBIN,
Appellant,

vs.

STATE OF ALASKA,
Appellee.

ON APPEAL FROM
THE COURT OF APPEALS
OF THE STATE OF ALASKA

MOTION TO DISMISS OR AFFIRM

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TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	ii
Authorities Relied Upon	vi
Motion to Dismiss or Affirm	1
Statement of the Case	1
Argument	
The Issues Raised by Appellant Are Not Substantial Federal Questions Requiring Review	3
1. Introduction	3
2. Alaska has juris- diction over this theft offense because it is incidental to regulation of the king crab fishery . . .	4
3. Alaska's assertion of jurisdiction over the instant offense was proper under Skiriotes v. Florida	6

Page

4. There is no substantial conflict between state and federal law . . . 7
5. Summary 12

TABLE OF AUTHORITIES

Cases

Page

<u>City of Burbank v. Lockheed</u> <u>Air Terminal, Inc.,</u> 441 U.S. 624	9, 10
<u>Corbin v. State,</u> 672 P.2d 156 (Alaska App. 1983)	3
<u>DeCanas v. Bica,</u> 424 U.S. 351	9
<u>Exxon Corp. v. Governor</u> <u>of Maryland,</u> 437 U.S. 117	11
<u>Florida Lime & Avocado</u> <u>Growers, Inc. v. Paul,</u> 373 U.S. 132	10
<u>F/V American Eagle v. State,</u> 620 P.2d 657 (Alaska 1980), <u>appeal dismissed,</u> 454 U.S. 1130	5
<u>Goldstein v. California,</u> 412 U.S. 546	7
<u>Pennsylvania v. Nelson,</u> 350 U.S. 497	9

	<u>Page</u>
<u>People v. Weeren,</u>	
607 P.2d 1279 (Cal. 1980),	
<u>cert. denied</u> , 449 U.S.	
839	5, 12
 <u>Ray v. Atlantic</u>	
<u>Richfield Co.,</u>	
435 U.S. 151	12
 <u>Roman v. State,</u>	
570 P.2d 1235	
(Alaska 1977)	11
 <u>Sexton v. California,</u>	
189 U.S. 319	9
 <u>Silkwood v. Kerr-McGee Corp.,</u>	
<u>U.S. _____,</u>	
104 S.Ct. 615	9
 <u>Skiriotes v. Florida,</u>	
313 U.S. 69	3, 4, 6
 <u>State v. Bundrant,</u>	
546 P.2d 530 (Alaska	
1976), <u>appeal</u>	
<u>dismissed sub nom.</u>	
<u>Uri v. Alaska,</u>	
429 U.S. 806	5, 7
 <u>State v. F/V Baranof,</u>	
677 P.2d 1245,	
(Alaska 1984)	5

Page

<u>United States v. Consuelo-</u> <u>Gonzalez</u> , 521 F.2d 259 (9th Cir. 1975) . . .	11
--	----

Constitutional Provisions

U.S. Const. art. I, §8, cl. 8	7
U.S. Const. art. I, §8, cl. 10	7
U.S. Const. art. III, §2, cl. 1	16
U.S. Const. art. III, §2	7, 8

Statutes

16 U.S.C. §1856(a)	4
18 U.S.C. §7(1)	1, 2
18 U.S.C. §661	2, 4, 11,
18 U.S.C. §2103	25
18 U.S.C. §3231	8
18 U.S.C. §3651	10
28 U.S.C. §1333	8

	<u>Page</u>
AS 11.46.100	2
AS 11.46.130(a) (1)	2
AS 12.55.035(b) (2)	11
AS 12.55.100(a) (2)	10
AS 12.55.125(e)	12

AUTHORITIES RELIED UPON

Constitutional Provisions

United States Constitution art. I, §8,
cl. 10 provides:

The Congress shall have power .
. . . to define and punish
piracies and felonies committed
on the high seas, and offenses
against the law of the nations.

United States Constitution art. III §2,
cl. 1 provides:

The judicial power shall extend
. . . to all cases of admiralty
and maritime jurisdiction.

Statutes

16 U.S.C. §1856(a) provides in relevant
part:

No state may directly or in-
directly regulate any fishing
which is engaged in by any
fishing vessel outside its
boundaries, unless such vessel
is registered under the laws of
the state.

If the property taken is of a value exceeding \$100, or is taken from the person of another, by a fine of not more than \$5,000, or imprisonment for not more than five years, or both; in all other cases, by a fine of not more than \$1,000 or by imprisonment not more than one year, or both.

If the property stolen consists of any evidence of debt, or other written instrument, the amount of money due thereon, or secured to be paid thereby and remaining unsatisfied, or which in any contingency might be collected thereon, or the value of the property the title to which is shown thereby, or the sum which might be recovered in the absence thereof, shall be the value of the property stolen.

18 U.S.C. §3651 provides in pertinent part:

. . .

While on probation and among the conditions thereof, the defendant . . .

May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had; . . .

18 U.S.C. §2103 provides:

If an appeal to the Supreme Court is improvidently taken from the decision of the highest court of a State, or of a United States court of appeals, in a case where the proper mode of a review is by petition for certiorari, this alone shall not be ground for dismissal; but the papers whereon the appeal was taken shall be regarded and acted on as a petition for writ of certiorari and as if duly presented to the Supreme Court at the time the appeal was taken. Where in such a case there appears to be no reasonable ground for granting a petition for writ of certiorari it shall be competent for the Supreme Court to adjudge to the respondent reasonable damages for his delay, and single or double costs.

28 U.S.C. §1333 provides in material part:

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

Alaska Statute 11.46.100 provides:

Theft defined. A person commits theft if

(1) with intent to deprive another of property or to appropriate property of another to oneself or a third person, the person obtains the property of another;

(2) the person commits theft of lost or mislaid property under AS 11.46.160;

(3) the person commits theft by deception under AS 11.46.180;

(4) the person commits theft by receiving under AS 11.46.190;

(5) the person commits theft of services under AS 11.46.200;

(6) the person commits theft by failure to make required disposition of funds received or held under AS 11.46.210.

Alaska Statute 11.46.130 provides in pertinent part:

Theft in the second degree. (a) A person commits the crime of theft in the second degree if the person commits theft as defined in AS 11.46.100 and

(1) the value of the property or services is \$500 or more but less than \$25,000;

(2) the property is a firearm or explosive; or

(3) the property is taken from the person of another.

(b) Theft in the second degree is a class C felony.

Alaska Statute 12.55.035(b) (2) provides:

(b) Upon conviction of an offense, a defendant who is not an organization may be sentenced to pay, unless otherwise specified in the provision of law defining the offense, a fine of no more than

. . .

(2) \$50,000 for a class A, B or C felony;

Alaska Statute 12.55.100(a) (2) provides:

(a) While on probation and among the conditions of probation, the defendant may be required

. . .

(2) to make restitution or reparation to aggrieved parties for actual damages or loss caused by the crime for which conviction was had;

Alaska Statute 12.55.125(e) provides:

A defendant convicted of a class C felony may be sentenced to a definite term of imprisonment of not more than five years, and shall be sentenced to the following presumptive terms, subject to adjustment as provided in AS 12.55.155-12.55.175:

(1) if the offense is a second felony conviction, two years;

(2) if the offense is a third felony conviction, three years;

(3) if the offense is a first felony conviction, and the defendant knowingly directed the conduct constituting the offense at a uniformed or otherwise clearly identified peace officer, fire fighter, correctional officer, emergency medical technician, paramedic, ambulance attendant, or other emergency responder who was engaged in the performance of official duties at the time of the offense, one year.

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The appellee moves the court to dismiss the instant appeal, or in the alternative to affirm the judgment of the Court of Appeals of Alaska, on the ground that the appeal does not present a substantial federal question.

STATEMENT OF THE CASE

Richard Powell, a resident of Kodiak, Alaska and a commercial king crab fisherman, stored crab pots in the Pacific Ocean approximately sixteen miles from Chirikov Island near Kodiak, Alaska. Corbin, a citizen of Alaska and a commercial king crab fisherman, stole Powell's crab pots in the fall of 1981 while operating the F/V Ocean Bounty, a vessel that was registered under the laws of Alaska.

After being indicted by a state grand jury, Corbin sought to have the prosecution dismissed for want of jurisdiction. He claimed the offense occurred within the maritime and territorial jurisdiction of the United States (18 U.S.C.

§7(1)) and that the special maritime and territorial jurisdiction of the United States was exclusive. Corbin also argued that the maritime and territorial theft statute (18 U.S.C. §661) pre-empted the Alaska theft statutes employed to prosecute him. (AS 11.46.100 and .130(a)(1)). The trial court denied the motion for dismissal both before the trial and during trial.

At trial Corbin asserted he should be acquitted because he believed the crab pots were abandoned. Corbin was convicted by a jury and sentenced to serve two years in jail. Twenty-one months of the sentence were suspended on the condition that Corbin pay restitution and comply with certain conditions of probation until July 6, 1984. The trial court has not yet determined the amount of restitution that Corbin will be required to pay, and has apparently not yet decided whether to fine Corbin. The trial court also ordered Corbin to refrain from commercial fishing for one year.

Corbin appealed his conviction to the Alaska Court of Appeals. The

Court of Appeals affirmed the trial court. Corbin v. State, 672 P.2d 156 (Alaska App. 1983). The court held that the enforcement of the theft statute was so closely tied to the regulation of the king crab fishery that state jurisdiction was justified.

On January 20, 1984, the Supreme Court of the State of Alaska declined to review the decision of the Court of Appeals.

ARGUMENT

THE ISSUES RAISED BY APPELLANT ARE NOT SUBSTANTIAL FEDERAL QUESTIONS REQUIRING REVIEW

1. Introduction

Corbin argues that the state does not have Skiriotes jurisdiction, Skiriotes v. Florida, 313 U.S. 69, over this offense because Alaska's second-degree theft statute conflicts with the power of Congress to punish felonies on the high seas, U.S. Const. art. I, §8 cl. 10, the admiralty and maritime jurisdiction of the federal courts, U.S. Const. art. III, §2, cl. 1, and the theft

statute applicable to the special maritime and territorial jurisdiction of the United States, 18 U.S.C. §661. The state's position is that it has Skiriotes jurisdiction either as an incident of its power to regulate the king crab fishery or without reference to that power, and because there is no conflict between federal and state law. Since the conflict issue is common to both arguments, it is discussed separately.

2. Alaska has jurisdiction over this theft offense because it is incidental to regulation of the king crab fishery

The Magnuson Fishery Conservation and Management Act, 16 U.S.C. §1856(a), permits states to regulate fisheries extraterritorially if a vessel is registered under the laws of the state that is attempting to assert jurisdiction. Under the FMCA, a state may enforce fishing regulations within the Fisheries Conservation Zone (FCZ) in the absence of conflicting federal regulations. Corbin took the position below that the state could regulate the king

crab fishery in the FCZ but could not enforce its second degree theft statute.

State v. F/V Baranof, 677 P.2d 1245 (Alaska 1984), F/V American Eagle v. State, 620 P.2d 657 (Alaska 1980), appeal dismissed, 454 U.S. 1130, and State v. Bundrant, 546 P.2d 530 (Alaska 1976), appeal dismissed sub nom. Uri v. Alaska, 429 U.S. 806 hold that Alaska has the power to regulate the king crab industry beyond the three-mile limit, at least in the absence of federal efforts to regulate this fishery. With one exception, state and federal courts have ruled similarly. The cases are collected in State v. F/V Baranof. See especially People v. Weeren, 607 P.2d 1279 (Cal. 1980), cert. denied, 449 U.S. 839 (upholding extraterritorial penal jurisdiction in absence of conflict with a federal regulatory scheme.)

Given the proposition that Alaska may regulate the king crab fishery extraterritorially, Alaska should be permitted to enforce its theft statutes extraterritorially when the theft involves fishing gear such as crab pots. Regulation of the theft of crab pots is

closely related to regulation of the crab fishery, is incidental thereto, and is consistent with the federal decision to permit Alaska to continue to regulate the king crab fishery. Indeed, it would be antithetical to permit Alaska to regulate the crab fishery and at the same time preclude Alaska from protecting crab fishing gear. Further, to require Alaska enforcement officials to contact federal enforcement officials, and ask that they investigate and prosecute offenses such as the instant theft of crab pots would be cumbersome, and a burden to federal enforcement personnel and on the federal courts.

3. Alaska's assertion of jurisdiction over the instant offense was proper under Skiriotes v. Florida

A state has Skiriotes jurisdiction if the defendant is a citizen of the state, if the state has a legitimate interest in enforcement of the state law at issue, and if there is no conflict between federal and state law.

The record below establishes that Corbin is a citizen of Alaska, that Powell is a resident of Alaska, and that Corbin's vessel is registered under the laws of Alaska. Further, the importance of the king crab fishery to Alaska is substantial. State v. Bundrant, 546 P.2d at 557.

4. There is no substantial conflict between state and federal law

Corbin implies that Alaska should not have jurisdiction here because Congress has the power to punish felonies on the high seas. U.S. Const. art. I, §8, cl. 10. However, his reliance on this power is misplaced as art. I, §8, cl. 10 does not expressly or by implication purport to vest all power to punish felonies on the high seas in Congress. See Goldstein v. California, 412 U.S. 546 (U.S. Const. art. I, §8, cl. 8 does not expressly or by implication vest all power to grant copyright protection exclusively in the Federal Government.)

Corbin's reliance on U.S. Const. art. III, §2, which provides that

the judicial power shall extend to admiralty and maritime matters, is similarly misplaced. Art. III, §2 does not purport to vest exclusive admiralty and maritime jurisdiction in the federal judiciary. Although Congress has specifically provided for exclusive federal jurisdiction in some admiralty and maritime matters, 28 U.S.C. §1333, it has not so provided with respect to criminal prosecutions.

Indeed, 18 U.S.C. §3231 was once held to indicate that Congress did not intend Title 18 of the United States Code to pre-empt the operation of state criminal codes although it was later construed much more narrowly. 18 U.S.C. §3231 provides:

The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof.

In Pennsylvania v. Nelson, 350 U.S. 497, 501 n.10 this court held that the second sentence of Section 3231 merely limited the effect of the jurisdictional grant in the first sentence. However, in Sexton v. California, 189 U.S. 319, this court relied on Section 3231 as evidence that Congress did not intend to supersede state criminal jurisdiction by enacting Title 18, and held that California had jurisdiction to entertain an extortion prosecution involving a threat to expose a person violating federal law.

In any event, the fact that Congress has enacted a criminal code governing conduct on the high seas does not preclude the enforcement of Alaska's criminal code in this case. Corbin has failed to demonstrate that Congress intended to preclude the application of state theft statutes in the circumstances presented here. In the absence of a clear congressional mandate, a finding of pre-emption is entirely unwarranted. Silkwood v. Kerr-McGee Corp., ___ U.S. ___, 104 S.Ct. 615, 621-626; DeCanas v. Bica, 424 U.S. 351, 358; City of Burbank

v. Lockheed Air Terminal, Inc., 441 U.S. 624.

Indeed, a conflict between state and federal law does not exist unless "compliance with both federal and state regulations is a physical impossibility" Florida Lime & Avocado Growers, Inc., v. Paul, 373 U.S. 132, 142-43.

Corbin implies that the Alaska theft statute and the federal theft statute conflict because Corbin faces the possibility of being required to pay restitution. This argument was not made below. Both federal and Alaska law provide that payment of restitution for actual damages or loss may be required. Compare 18 U.S.C. §3651 with AS 12.55.-100(a)(2). Thus, the fact that Alaska may require restitution is no indication that there is a conflict between state and federal law.

Corbin's suggestion that his privilege to fish could not have been suspended under federal law does not aid his cause. This argument was not made below. The prevailing federal view is that a condition of probation may be

imposed if it reasonably can be said to be expected to contribute to the rehabilitation of an offender or to the protection of the public. United States v. Consuelo-Gonzalez, 521 F.2d 259 (9th Cir. 1975) is the leading federal case. Alaska has adopted the federal rule. Roman v. State, 570 P.2d 1235, 1240 (Alaska 1977). Since the validity of the suspension of Corbin's fishing license must be tested by the same standard in state and federal court, it is clear that there is no conflict in this matter.

The fact that Corbin may face a possible maximum \$50,000 fine (AS 12.55.035(b)(2)) rather than a possible maximum \$5,000 fine (18 U.S.C. §661) since he was prosecuted in state court does not suggest the existence of a meaningful conflict between state and federal law. Hypothetical conflicts between state and federal law are not grounds for finding that there is a conflict. See Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (hypothetical conflict arising from possibility that state requirement of uniform price reductions would conflict with Robinson-Patman Act

insufficient to warrant pre-emption.) Moreover, the fact that a greater fine may be imposed against a person convicted under the state law represents no conflict between state and federal policy because the possibility that a higher fine may be imposed has not been shown to meaningfully negate any objective of Congress. See Ray v. Atlantic Richfield Co., 435 U.S. 151, 174 n.25 and City of Burbank v. Lockheed Air Terminal, 411 U.S. 624.

In this regard it is noteworthy that the maximum possible jail sentence under both statutes is the same -- five years. Compare 18 U.S.C. §661 with AS 12.55.125(e).

5. Summary

Since there is no substantial federal question, this Court should either dismiss or affirm and should not exercise its jurisdiction to review this matter by way of certiorari under 18 U.S.C. §2103. This Court declined to consider a similar issue in People v. Weeren, 607 P.2d 1279 (Cal.) cert. denied 449 U.S. 839 (1980) and circumstances

have not changed such that it is appropriate to grant certiorari presently. In this regard, it should be noted that there is no meaningful conflict of decisions concerning the validity of extraterritorial regulations of fisheries and that the decision of the Alaska court of appeals is correct.

RESPECTFULLY SUBMITTED this
9th day of May, 1984.

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